No. 89- 1393

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

SCOTT FUGATE,

Petitioner,

v.

BORG TEXTILE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Scott Fugate, then twenty years old, filed suit in 1985 within the statute of limitations for injuries suffered by him when he was four years old, but sued a corporation that had, in another suit, settled his infant's claim in 1973 and had been released.

He substituted other alleged tortfeasors, all manufacturers of components of the coat that caught fire, severely burning him. One of them, Respondent, had been notified of the original suit when it was filed in 1970, had been vouched to defend it by the named Defendant and cooperated in preparing its defense fully and kept and still has a complete file on the original case; but now claims it had not enough notice to allow FRCP 15(c) relation back to February 1, 1985, when the statute of limitations expired.

Was the notification received by Respondent in 1970 and subsequently, of Petitioner's claim and Respondent's potential obligation, sufficient notice to allow FRCP 15(c) relation back in a suit in 1985?

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JURISDICTION

The date of entry of the decree sought to be reviewed was July 27, 1989. An extension for filing was granted by the Honorable, The Chief Justice of the United States, until _____, and thereafter having met the time period, the petition was filed. The statutory provision believed to confer jurisdiction on the Court to review the judgment or decree in question by writ of certiorari is 28 U.S.C.A. 1254 (1988).

STATEMENT OF THE CASE

Scott Fugate was born February 2, 1965, and lived an uneventful infancy in Milton, West Virginia, until he was nearly five. On November 20, 1969, after playing outside with a neighbor child, he and the other boy went into the neighbor's garage where a space heating gas stove was lit.

Scott backed up to the stove (from which no flame escaped) with his hands in the coat's side pockets, warming his backside. But after a short time the coat burst into flame. He ran from the garage toward his home across the street, screaming. His father caught him in their front yard and rolled him on the ground while tearing the jacket off.

Dr. Donald Klinestiver's office was about a block away. When he saw Scott a few minutes later, gobs of smoldering plastic from the coat material were clinging to his body. He hospitalized him in St. Mary's Hospital in Huntington, West Virginia, from November 20, 1969, until January 30, 1970, where the child received skin grafts and whirlpool treatments to the third degree burns on his buttocks, back and underarms.

Scott's parents, Robert and Linda Fugate, sued Sears in 1970, and during trial in 1972 settled with Sears and with the company that assembled the coat, J. H. Kellman Co., of Cleveland, Tennessee, that entered the case at trial time. Summary proceedings to close Scott's claims against Sears and Kellman concluded the case, by order, on April 27, 1972. This writer represented Scott and his parents throughout.

The parents' medical accounts for Scott were paid, as was the account for Robert's burns suffered while he was getting the coat off Scott. Lawyers' fees were approved by the Court and paid, and Scott's money was put into an interest bearing account with his father and mother as necessary co-signers.

Lawyer Harshbarger, Robert Fugate and his brother James had discussed at the time of the settlement the possibility that there might be recovery at a later time before Scott was twenty-one, against the manufacturers of the coat

component parts: Borg Textile, which made the acrylic pile lining; Interstate Textiles, also known as Quilted Textiles, which made a polyester foam-like insulation sandwiched between the outer shell and the lining; and Crompton Company, which made the outer shell exterior fabric and which is in bankruptcy.

In 1976, Harshbarger sought and won a statewide election to a seat on the West Virginia Supreme Court of Appeals. He notified his clients, put aside his general practice legal fare doing deeds, wills, divorces and wrecks, sold his office and went to work as a judge.

He was defeated in the primary in 1984 when seeking re-election.

In the fall of 1984[1], I recall seeing Todd Fugate at a local restaurant. Todd was Scott's uncle, too. I asked Todd how old Scott was, wondering if he had explored whether there were other defendants who might share responsibility for his injuries, makers of the components of Scott's coat.

I was advised that Scott would be twenty-one February 2nd, and that he had had other, recent surgery, to "free" keloids that severely limited his muscle movement in underarms, back and neck.

I mentioned to Todd that there were lawyers who knew something about the old case, primarily M. Joseph Thomas, of St. Albans. Joseph had finished law school at The University of Tennessee, and had Tennessee connections. J. H. Kellman, as I recalled in 1984, was the one to sue, and he was in Cleveland, Tennessee.

The only file I had was my trial file from 1972 -- the materials I took to the courthouse. It had depositions, exhibits, outlines on each witnesses' testimony, pleadings or documents that might be used in trial, and the complaint, answers to interrogatories, and admissions. There was not one document about the settlement either with Sears or J. H. Kellman.

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[1] By Your leave, this section will be in the first person.

Scott talked with Mr. Thomas, to whom I delivered my file remnants. He then associated with other counsel in Tennessee and suit was brought against J. H. Kellman Company on January 29, 1985, four days before the statute of limitations bar.

As soon as I heard about Kellman (I had joined Mr. Thomas as lawyer for Scott) we moved to drop Kellman and substitute the coat's component makers, Crompton (in bankruptcy), Interstate Plastics (could not be found) and Borg, a viable corporation whose headquarters we discovered were in Georgia according to answers to interrogatories furnished by Kellman's lawyers July 29, 1985.

The Eastern District of Tennessee District Court by pretrial order entered June 19, 1985, said:

> "Joinder of Parties and Amendment of Pleadings: If the parties wish to join additional parties to this lawsuit, such joinder should be made by October 4, 1985. Any technical amendments to the pleadings or amendments based upon presently known facts should be made by October 4, 1985."

Thereafter, the file was moved to the Southern District of West Virginia, wherein upon Borg's motion Scott was subjected to dismissal on summary judgment, affirmed by the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

"The principal purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way." So writes Justice Stevens with the concurrence of the Chief Justice and Justice White, in dissent to *Schiavone v. Fortune*, 106 Sup. Ct. 2379, 477 U.S. 21, 91 L.Ed.2d 18, 54 U.S.L.W. 4692, 4 Fed. R. Serv.3d 1009, (1986).

Your Court adopted significant texts from the Third Circuit opinion:

> "It regarded the language of Rule 15(c) as 'clear and unequivocal.' Fed.2d at 18. It also said: 'While we are sympathetic to plaintiffs' arguments, we agree with the defendant that it is not this court's role to amend procedural rules in accordance with our own policy preferences.' *Ibid.*" 106 Sup. Ct. at 2382.

A substitution of parties relates back only if during the time before the statute runs, the new party had "such notice" of the institution of the suit that its ability to defend will not be prejudiced, and knew or should have known that "but for a mistake concerning the identity of the proper party, the action would have been brought against him." Rule 15(c).

An affidavit filed by Borg's Secretary/Treasurer, James Thompson, supporting the motion for summary judgment made September 10, 1987 -- *two years* after Borg was added as a party in 1985 -- states that the company, when Sears demanded it defend the 1970 suit, turned the whole matter over to its insurer, its agent INA. INA, to this very minute, has had, apparently since 1970, and continues to have, a complete file about the part Borg's product played in the fabric fire that burned Scott Fugate. The affidavit further says that Borg's

own in-house files have not existed since 1979 -- *long before* it would have been useful against Scott Fugate's 1985 suit.[2]

Borg, that turned down an opportunity to defend against Scott's claim when it was brought in 1970, but that freely assisted the named defendant, Sears, Roebuck & Co., cannot now be heard to deny that "but for a mistake concerning the identity of the proper party" it would have been sued in 1985.

This requirement, that Borg "knew or should have know that, but for a mistake concerning the identity of the proper party, the action would have been brought against (it)", is met by the statements of Kellman's lawyer in Tennessee and Borg's Secretary/Treasurer. They say that Borg was not notified until it was made a party, that there was a suit pending against Kellman. But Borg was notified by the main defendant, Sears, Roebuck & Co., in 1970, and opened a file through its insurer, INA. Borg refused to defend the 1970 suit but cooperated

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[2] The Thompson affidavit states, in part, that:

"3. All information and documentation concerning this accident and potential claim are derived from the records of Insurance Corporation of North America as Borg Textile Corporation possesses no records generated prior to January, 1979;

4. On or about July 8 or July 20, 1970, Sears, Roebuck & Co. demanded, by correspondence, that Borg Textile assume Sears' defense in this action;

5. By letter, dated July 27, 1970, Bunker-Ramo Corporation, the parent company of Borg Textiles, notified its liability insurance carrier, Insurance Corporation of North America, of the possible claim against Borg Textiles;

6. At no time during the pendency of the aforementioned suit was Borg named or made a party to those proceedings. Despite this, Borg cooperated fully with the parties in investigating the plaintiff's claims. On several occasions, Sears, Roebuck & Co. discussed the case in great detail with the agents of Borg's insurance company. However, the initial request for indemnification was never honored by Borg, nor was this request renewed by Sears..."

On September 10, 1985, Judge Allen Edgar, in the United States District Court for the Eastern District of Tennessee, allowed addition of Borg and Crompton as defendants.

with Sears in defending its suit. Borg's insurer, whose knowledge is certainly imputed to Borg, see *Dupree v. Walters*, 116 F.R.D. 31 (S.D.N.Y. 1987) , *is* Borg, and thus Borg has had knowledge and notice of Scott Fugate's claim against Borg since 1970, in great detail.

The Court wrote in *Schiavone*, 106 Sup. Ct. 2379, 2384:

> "Central to the resolution of this issue is the language of Rule 15(c). . . Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading: (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that the party must or should have known that, but for a mistake concerning identity, the action would have been taken against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period. We are not concerned here with the first factor, but we are concerned with the satisfaction of the first three."

The fourth requirement, above, must be a mistake. It simply begs the question, which is, *does* an amendment substituting parties thus extend the statute of limitations? It creates a nonsense situation where a rule that has as its general sweep a positive affirmation about amendments relating back when the statute has run, and then imposes conditions that *pend* upon whether the statute has run.

Both conditions suppose some notice to a defendant sought to be brought into the suit: that it had so much notice the suit was brought that it would not be prejudiced in defending it and knew that it was, but for a mistake, a proper party. But again, both conditions require that amendment be attempted while the time for bringing a new suit is alive; when

application of Rule 15(c) *is not needed at all.* A plaintiff would simply file a new suit with the correct party, tolling the statute.[3]

The Court concluded that, "The linchpin is notice and notice within the limitations period. Of course, there is an element of arbitrariness here, but that is characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process." Supra, at 2385.

The notice required in Rule 15(c) could hardly exceed that which Borg received: 1) written demand by Sears, the named defendant, that Borg defend the case as one of the contributors of plastic fabric made into the coat, 2) refusal to defend but extensive cooperation with Sears in all aspects of preparation of the defense, all this in 1970-1973 while Scott was between five and eight years old. Borg's insurer made and kept its file on Scott, which would, of course, make any prejudice to Borg very unlikely.

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[3] As the dissent in *Schiavone* recognizes: "The principal purpose of Rule 15(c) is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way. That purpose is defeated -- and the Rule becomes largely superfluous -- if it is construed to require the correction to be made before the statute has run. Moreover, the specific liberalizing purpose of the 1966 amendment to the Rule is frustrated if the added language in construed to cut back on the number of cases in which relation back is permitted."

CONCLUSION

Relief against arbitrary laws and rules propelled courts of conscience to invent equity and rules such as FRCP 15(c).

It is the history of jurisprudence that laws and rules intended to relieve against oppression often have the balm interpreted out of them. Rule 15(c) should not be allowed, in Scott Fugate's factual situation, to be stripped of beneficence.

Respectfully Submitted,

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3827

SCOTT FUGATE

Plaintiff - Appellant

v.

BORG TEXTILE CORPORATION

Defendant - Appellee

and

CROMPTON COMPANY, INC.

Defendant

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Charles H. Haden, II, Chief District Judge. (C/A No. 86-0038)

Submitted: July 28, 1988 Decided: July 27, 1989

Before HALL, SPROUSE, and WILKINSON, Circuit Judges.

Sam Ross Harshbarger for Appellant. Cheryl Ann Eifert, D. C. Offutt, Jr. (JENKINS, FENSTERMAKER, KRIEGER, KAYES & FARRELL) for Appellee.

PER CURIAM:

Plaintiff, Scott Fugate, appeals the district court's order dismissing his products liability action against Borg Textile Corporation ["Borg Textile"], which allegedly manufactured the component parts of a child's coat that burned while being worn by Fugate in 1969. We affirm.

Scott Fugate was born in Huntington, West Virginia on February 1, 1965. On or about November 20, 1969, when Fugate was four years old, he was severely injured when the coat he was wearing burned. In 1972, Fugate, through this legal guardian, entered into a settlement agreement with J. H. Kellman Co., Inc. ["Kellman"], the alleged manufacturer of the coat, and Sears, Roebuck and Co. ["Sears"], the coat's retailer, releasing Fugate's claims against Kellman and Sears arising out of the incident.

On January 29, 1985, Fugate commenced this products liability action against Kellman in a West Virginia federal district court, basing jurisdiction on diversity of citizenship. On August 16, 1985, Fugate filed a motion to amend his complaint to add as defendants Borg Textile and Crompton Company, Inc. ["Crompton"], which allegedly manufactured the component fabrics of the coat assembled by Kellman. By order entered September 18, 1985, the district court granted the motion to amend and, pursuant to a motion by Fugate, dismissed Kellman from the suit with prejudice based on the 1972 settlement. However, Crompton was never served and never appeared in the action.

Borg Textile filed a motion for summary judgment based, *inter alia*, on West Virginia's two-year statute of limitations, W.Va. Code § 55-2-12, which, by operation of West Virginia's tolling provision for infancy, W.Va. Code § 55-2-15, expired on February 2, 1985. In the motion for summary judgment, Borg Textile contended that it had no knowledge of the action against Kellman and knew nothing of Fugate's claim until December, 1985. Accompanying the motion for summary judgment were two affidavits, one executed by Silas Williams,

Jr., the attorney for Kellman, stating that he never informed Borg Textile of Fugate's claim, and that to his knowledge, no other representative of Kellman ever notified Borg Textile of the claim.

In the other affidavit, James Thompson, Borg Textile's Secretary/Treasurer, swore that although Borg Textile knew as early as 1970 of its potential liability to Fugate, it did not receive notice of Fugate's claim against Kellman until December 5, 1985, when the complaint was amended to add Borg Textile as a defendant.

On February 18, 1988, the district court entered an order granting summary judgment, dismissing the action against Borg Textile as barred by the statute of limitations, and awarding costs to Borg Textile. The district court's order contained no express determination that there was no just reason to delay an appeal. *See* Fed. R. Civ. P. 54(b).

Fugate filed his notice of appeal on February 26, 1988. On March 2, 1988, the district court entered an order dismissing the remaining defendant, Crompton, in response to Fugate's expressed intention not to pursue the action further against Crompton. No new notice of appeal was filed.

I

As a preliminary matter, we address our jurisdiction to hear this appeal. The order entered February 18, 1988, did not dispose of Fugate's claims against Crompton. However, Crompton was never served, nor did Crompton appear in the action. A judgment which disposes of all claims as to all parties served in an action, but does not dispose of claims against a remaining unserved defendant, is a final appealable order, at least when the claims against the remaining defendant are ultimately disposed of, as occurred in the instant case. *See Sider v. Valley Line*, 857 F.2d 1043, 1045-46 (5th Cir. 1988); *Insinga v. LaBella*, 817 F.2d 1469-70 (11th Cir. 1987); *Nagle v. Lee*, 807 F.2d 435, 438 (5th Cir. 1987); *Bristol v. Fibreboard*

Corp., 789 F.2d 846, 847-48 (10th Cir. 1986); *Patchick v. Kensington Publishing Corp.*, 743 F.2d 675, 677 (9th Cir. 1984); *Leonhard v. United States*, 633 F.2d 599, 608-09 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *De Tore v. Local No. 245 of the Jersey City Pub. Employees Union*, 615 F.2d 980, 982 n.2 (3rd Cir. 1980). We therefore have jurisdiction to consider the appeal.

II

Under W.Va. Code §§ 55-2-12 and 55-2-15,[1] Fugate had until February 2, 1985 (two years from reaching the age of majority) to file suit against Borg Textile. *See Guaranty Trust*

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[1] Those provisions state:

§ 55-2-12. Personal actions not otherwise provided for.

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injures; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

§ 55-2-15. General saving as to persons under disability.

If any person to whom the right accrues to bring any such personal action, suit or scire facias, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant or insane, the same may be brought within the like number of years after his becoming of full age or sane that is allowed to a person having no such impediment to bring the same acknowledgment as is mentioned in section eight (§ 55-2-8) of this article, except that it shall in no case be brought after twenty years from the time when the right accrues.

An infant is defined as a person under the age of eighteen years. *See* W.Va. Code § 2-2-10(m), (aa).

Co. v. York, 326 U.S. 99 (1945); *Maynard v. General Electric Co.*, 486 F.2d 538 (4th Cir. 1973). Fugate filed his action against Borg Textile on December 2, 1985. Therefore, unless the amended complaint related back to the filing of the original complaint against Kellman under Fed. R. Civ. P. 15(c),[2] Fugate's suit was barred by the statute of limitations.

The record supports the district court's determination that Borg Textile did not receive notice of the suit instituted against Kellman on January 29, 1985, until December, 1985. As Borg Textile did not have notice of the actual litigation (as opposed to the incidents giving rise to the cause of action), the amended complaint naming it as a defendant was properly deemed not to have related back to the filing of the original complaint against Kellman. *See* Fed. R. Civ. P. 15(c); *Schiavone v. Fortune*, 477 U.S. 21, 29-30 (1986); *Weisgal v. Smith*, 774 F.2d 1277 (4th Cir. 1985). Thus, the district court properly held that Fugate's suit was time-barred.

We dispense with oral argument because the dispositive issues recently have been decided authoritatively and argument would not aid the decisional process.

AFFIRMED

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[2] Federal Rule of Civil Procedure 15(c) provides, in part:

(c) **Relation Back of Amendments** . . .

An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

SCOTT FUGATE,
Plaintiff,

vs. CIVIL ACTION NO. 3:86-0038

BORG TEXTILE CORPORATION, et al,
Defendants.

ORDER

Pending is the motion for summary judgment filed by the Defendant Borg Textile Corporation. The time for responding having passed, the Court now considers this motion.

This is an action seeking damages for personal injuries sustained by the Plaintiff as the result of burns he received while wearing a coat manufactured from materials supplied by the Defendant Borg. These injuries occurred on approximately November 20, 1969, when the Plaintiff was only four years old.

An earlier action was brought in 1970 against Sears, Roebuck & Company, the seller of the coat, by the Plaintiff's parents. Although Borg was aware of this proceeding, it was never made a party to it. By affidavit, James Thompson, the Secretary/Treasurer of Borg has stated upon his personal knowledge that the "plaintiffs were aware of the possible liability of J. H. Kellman Company, Crompton Company and Borg Textiles" at the time of the earlier action. That case was resolved through a settlement agreement between the plaintiffs and Sears and Kellman, the manufacturer of the coat.

More recently, on January 29, 1985, the Plaintiff filed a complaint based on the same injuries against Kellman in the United States District Court for the Eastern District of

Tennessee. The complaint against Kellman was dismissed on the basis of the earlier settlement. An amended complaint was filed in that action on December 2, 1985, naming Borg as a defendant. Subsequently, the case was transferred to this Court.

The Defendant Borg, previously by a motion to dismiss,* and now by its motion for summary judgment, contends that when the amended complaint was filed in this action, the statute of limitations on the Plaintiff's claims had run; and because Borg had no notice of the action until after the filing of the amended complaint naming it as a Defendant, the amendment does not relate back so as to toll the statute of limitations.

The applicable statute of limitations in a personal injury action is two years. *W. Va. Code*, §55-2-12. This limitation applies to causes of action sounding in tort -- negligence and strict liability -- as well as contract -- breach of implied warranties. *Maynard v. General Electric Co.*, 486 F.2d 538 (4th Cir. 1973) (applying West Virginia law). The two-year period began to run, in this case, upon the Plaintiff's eighteenth birthday, February 1, 1983, *W.Va. Code*, §55-2-15. Accordingly, an action based upon the Plaintiff's injuries must have been brought by February 1, 1985.

The instant action was filed on January 29, 1985. The amendment bringing in Borg as a Defendant was not made until December 2, 1985. Therefore, unless such amendment can be said to relate back to the original filing, this action is barred by the statute of limitations.

Rule 15(c), Federal Rules of Civil Procedure, provides in pertinent part that

> "[a]n amendment changing a party against whom a claim is asserted relates back if [the claim

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* Although the Plaintiff has not responded to Borg's motion for summary judgment, he did respond to the motion to dismiss, and so the Court considers that response in passing on the instant motion.

> asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading] and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party."
>
> "Three elements must be met before Rule 15(c) relation back will be allowed, even when the result could be extinguishment of the claim: (1) same transaction or occurrence; (2) the new party had notice of the action prior to the expiration of the statute of limitations; and (3) he knew or should have known that but for a mistake in identity the action would have been brought against him."

Weisgal v. Smith, 774 F.2d 1277, 1279 (4th Cir. 1985). Clearly, the first of these elements is met in this case.

As to the second condition for relation back of an amendment bringing in a new party defendant, Borg contends that it did not receive notice of the instant action until after the running of the statute of limitations. This contention is supported by the affidavits of its Secretary/Treasurer, who has sworn that such notice was not received until December, 1985, and Silas Williams, Jr., who represented Kellman prior to its dismissal from this case, and who has sworn that he did not notify Borg of the pendency of this action.

In *Weisgal*, the court held in part that *Rule* 15(c) should be applied "as it is written . . . even though such an application in the rare case might work a harsh result." *Id.* The notice

requirement calls for, according to the plain language of the rule, "notice of the *institution of the action*" (emphasis added) within the limitations period. Therefore, that Borg knew of the prior action brought in 1970 or of the Plaintiff's injuries and his possible claims against it is of no relevance to the inquiry here. *See Cooper v. U.S. Postal Service*, 740 F.2d 714, 717 (9th Cir. 1984) (notice of the institution of the action "is the only notice relevant to rule 15(c)").

In his response to Borg's earlier motion to dismiss also asserting that this action is barred by the statute of limitations, the Plaintiff argued that Borg could not maintain that it had been prejudiced by notice received after the limitation period had expired. However, prejudice is not, by itself, a factor in determining relation back under *Rule* 15(c). Again, the plain language of the rule requires notice of the action. Only if some sort of notice has been communicated will the Court consider whether it was sufficient to avoid prejudice to the new Defendant.

Because this second condition for relation back under *Rule* 15(c) has not been met, the Court does not consider whether the third element has been satisfied. All three conditions must be met for relation back of an amendment bringing in a new defendant. *Weisgal*, 774 F.2d at 1279.

For the foregoing reasons, the Court finds that the Defendant Borg Textile Corporation did not receive notice of this action prior to the expiration of the limitations period. Accordingly, the Court concludes that the Plaintiff's action against Borg is barred by the statute of limitations. Borg's motion to compel, also pending before the Court, is hereby rendered moot, and so the Court does not now consider that motion.

In reviewing the record, the Court notes that the remaining Defendant Crompton Company, Inc. has not been served, nor has it appeared in this action. The Plaintiff, therefore, is directed to notify the Court within fourteen days of the entry of this Order of his intentions regarding pursuing his claims against Crompton.

The Clerk is directed to send a certified copy of this Order to counsel of record.

ENTER: February 18, 1988

/s/ Charles H. Haden, II

Charles H. Haden II, Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

SCOTT FUGATE,
Plaintiff,

vs. CIVIL ACTION NO. 3:86-0038

BORG TEXTILE CORPORATION, et al,
Defendants.

JUDGMENT ORDER

In accordance with the Order entered this day, the Court hereby ORDERS as follows:

1. That the Defendant Borg Textile Corporation's motion for summary judgment is granted; and

2. That, as to this Defendant, the Plaintiff take nothing, the action be dismissed on the merits, and the Defendant recover of the Plaintiff its costs of action.

The Clerk is directed to send a certified copy of this Judgment Order to counsel of record.

ENTER: February 18, 1988

/s/ Charles H. Haden, II
Charles H. Haden II, Chief Judge